

The Contradictions of Progressive Constitutionalism

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I. INTRODUCTION

Americans prize their Constitution, but it is the Declaration of Independence that has by far been the greater inspiration to peoples around the world.¹ Even in the United States, the Declaration has, in certain ways, been a greater source of inspiration for political action, with numerous groups having produced their own “Declarations.”² While the Constitution has of course

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¹ See DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 63–138 (2007).

² See generally PHILIP S. FONER, *WE THE OTHER PEOPLE: ALTERNATIVE DECLARATIONS OF INDEPENDENCE BY LABOR GROUPS, FARMERS, WOMAN'S RIGHTS ADVOCATES, SOCIALISTS, AND BLACKS, 1829–1975* (2007) (giving background to and describing “declarations” for various minority groups that came after the original Declaration of Independence).

served as a source of yet-to-be-realized ideals,³ it is less a source of political *inspiration* as it is a source demanding authoritative *interpretation*. Perhaps most notably, conservative forces almost always invoke the Constitution, not the Declaration of Independence, when they seek to halt the development of progressive movements and ideas. Of course, the Constitution is not always and everywhere a conservative document. But it is in some ways a body of established doctrine and law—*higher* law—that is supposed to limit and shape the further development of normal, democratic lawmaking. The Declaration of Independence, on the other hand, is a purely revolutionary document. It looks forward, to the emancipation of a people, and rejects the legitimacy of any regime that denies that people's emancipation. It articulates a set of political principles, a demand for freedom and equality, and it defines the agents who will realize these principles: the group that has been denied representation and self-government by the colonial regime.

This Article is not about the contrast between the Declaration and the Constitution, but about an underlying contrast, even contradiction, which the comparison of the two documents illuminates. The contradiction is between the backward-looking character of "constitutionalism" and the forward-looking character of "progressive politics." By focusing on this paradox we can bypass the nominalistic debate about what "progressive constitutionalism" means. Even if participants could agree about the meaning of progressive constitutionalism, such agreement could not remove the fundamental ideological conundrum facing any attempt to combine a politics of progress with a commitment to constitutionalism. Simply put, any commitment to progress is a commitment to a substantive principle: the expansion of equal freedom. This substantive principle comes with a forward-looking view of politics, history and law that is at odds with constitutionalism. Constitutionalism is backward looking, concerned with formalism and legal continuity, the limitation of ordinary politics, and a respect for past acts of lawmaking.

I will spell out this contradiction in greater detail below, but suffice it to say that it lies at the heart of current debates of progressive constitutionalism. The different camps within progressive constitutionalism have addressed themselves to this contradiction by trying to make constitutionalism more popular, and by implication, more progressive. As I seek to show below, these attempts at reinterpreting constitutionalism come at the expense of thinking through what counts as progressive in the first place. While the tension between progress and constitutionalism can be managed, it cannot be resolved, and there are moments when one must give way to the other. A commitment to equal freedom sometimes requires a critique and even rejection of constitutionalism. Somewhat more moderately, it requires a shift in intellectual and political orientation not just from courts to "the People," but to an analysis of what kinds of popular politics can be considered progressive. At the end of the day, this

³ See Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* 74 J. AM. HIST. 1013, 1014 (1987).

shift in orientation requires not the generation of new or more appropriate constitutional ideas—with the hopes that judges, lawyers and other legal professionals might take them on—but activities that promote progressive majorities. And, further, it may require an acknowledgement that something like progressive constitutionalism may only be possible under certain historical circumstances—circumstances that are beyond the control of legal professionals.

Let me restate the above in the form of three propositions, which I will then support in the rest of this Article. The *first proposition* is that progress means *the expansion of equal freedom*. This proposition springs from the thought that the progressive constitutionalist debate has not, in fact, given us much in the way of thinking about what counts as progress. For this principle of progress we have to look to political, not constitutional, theory. The *second proposition* is that, when we think of progress as the expansion of equal freedom, then *progressive constitutionalism is grounded in the political agency of unequal, unfree groups*. That means progressive constitutionalism is more than just a form of popular constitutionalism. Progressive politics is the activity by which those currently denied their equal liberties (e.g., civil rights, economic opportunities, political powers) organize themselves and exercise their political agency to transform society. This is a popular politics, but it is not just any kind of political activity by the People. The *third proposition* is that *progressive constitutionalism is only possible under certain circumstances, and that a commitment to progress involves a commitment to creating these political and social conditions*. Progressive constitutionalism has tended to focus on creating the right legal doctrines, and getting these doctrines approved by judges and legal activists. However, the focus might best be placed on creating the kinds of progressive majorities⁴ that can advance the cause of equal freedom.

These propositions may sound rather abstract, and some of the defense of them in the ensuing pages will be general and theoretical. In the first two sections of the Article I will discuss the contradiction with which I opened this Introduction, and then some attempts by “progressive constitutionalists” to resolve this contradiction that I find dissatisfactory. But then, to make the argument concrete, I will draw on what I consider a historical example of my way of thinking about progressive constitutionalism. The example is the labor republicans of the late nineteenth century. “Labor republican” is a term drawn from intellectual, labor and constitutional history, and refers to a group of reformers and editors mainly around the Knights of Labor, but also the Populist Party, which sought to organize the working classes into a political force.⁵ The

⁴ Regarding this idea of a progressive majority, see Alex Gourevitch & Aziz Rana, *Democrats Must Avoid the Trap of False Pragmatism*, NEW DEAL 2.0 (Jan. 27, 2011, 8:54 AM), <http://www.newdeal20.org/2011/01/27/democrats-must-avoid-the-trap-of-false-pragmatism-33924/>.

⁵ For some of the key sources, which I will discuss in greater detail below, see William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 787–90, 808–12; David Montgomery, *Labor and the Republic in Industrial*

labor republicans can offer us a model for thinking about what progressive constitutionalist politics might look like, the conditions under which it is and is not possible, and how to understand the contradiction between progress and constitutionalism in the first place.

II. CONSTITUTIONALISM AND THE PRINCIPLE OF PROGRESS

A. *The Idea and Principle of Progress*

Progressive constitutionalists have expended huge amounts of energy on how to interpret the Constitution, but they have said much less about how to interpret the principle of progress. Most writings seem to have assumed a general agreement on what counts as progressive aims. As far as I have been able to tell, this assumption is rather low-level. It has meant something like the familiar set of left-liberal policies, like affirmative action, gay rights, gun control, health care and social security benefits, environmental protection laws, and perhaps a defense of other welfare programs. I say this is a low-level set of assumptions because it is not really an appeal to principle so much as a derivative appeal to established policies of the Democratic Party, or American liberals. It is not immediately obvious that there is any background principle that unites this array of policies into a coherent “progressive” ideology. To be sure, there are some ideas that stand behind these policies. One, for instance, is the idea that positive state action is permissible and desirable to correct inequalities and social injustice. This is an old Progressive Era idea,⁶ and in that sense it might be fair to say there is something progressive here.

However, the term “progressive” refers to something more robust and long-standing than simply the ideas of a particular, contested period in American history. It refers to the idea of progress itself. This is a wider and deeper principle, of more long-standing and sweeping origins than nineteenth-century American thought. It would be absurd to attempt to reconstruct the idea of progress in a short article, and so I must be somewhat assertive here in arguing that the basic principle of progress is the expansion of equal freedom. However, this idea is familiar enough to us from the standard thinkers of modern political thought. When inscribing the premise that all men are created free and equal into the Declaration of Independence, Jefferson was calling on a long tradition

America: 1860–1920, LE MOUVEMENT SOCIAL, Apr.–June 1980, at 201, 204–06; James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941, 965–66 (1997); Sean Wilentz, *Against Exceptionalism: Class Consciousness and the American Labor Movement, 1790–1920*, 26 INT’L LAB. & WORKING CLASS HIST. 1, 14 (1984). On the republicanism of the Populists, see AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 176–235 (2010).

⁶On the Progressive Era, see William J. Novak, *The Legal Origins of the Modern American State*, in LOOKING BACK AT LAW’S CENTURY 249, 249–83 (Austin Sarat, Bryant Garth & Robert A. Kagan eds., 2002). See generally GABRIEL KOLKO, *RAILROADS AND REGULATION, 1877–1916* (1965); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920* (1982).

of thinking. First articulated in state of nature theory, social contract theorists like Hobbes and Locke argued that all persons are naturally free and equal.⁷

Jean-Jacques Rousseau radicalized this thought when he argued that the origins of inequality lay in coercive property arrangements,⁸ but that an historical act of social transformation or *new* social contract could turn unequal relationships into a situation in which “each associate . . . while uniting with all, nevertheless obeys only himself and remains as free as before.” The great advantage of this condition is that this freedom is equal: “[T]he condition is equal for everyone; and since the condition is equal for everyone, no one has an interest in making it burdensome for the others.”⁹ It is perhaps with Rousseau that we first get the idea that making persons equally free is not just a natural condition, but a historical event; it “does not come from nature. It is therefore founded upon convention.”¹⁰ Relations of equal freedom are a kind of horizon towards which society aspires. The expansion of equal freedom here becomes a principle from the standpoint of which we can assess and evaluate history—it becomes the measure of progress. Kant appealed to equal freedom in his definition of law: “*Right* is the restriction of each individual’s freedom so that it harmonises with the freedom of everyone else.”¹¹ And he saw the future progress of mankind linked to the establishment of legal and political relationships governed by principles of “*Right*.”¹² Even Marx thought that the basic standard for evaluating the progress of mankind was the establishment of the principle that “the free development of each is the condition for the free

⁷ THOMAS HOBBS, *LEVIATHAN* 86 (Richard Tuck ed., Cambridge Univ. Press rev. student ed. 1996) (1651) (“Nature hath made men so equall, in the faculties of body, and mind . . .”); JOHN LOCKE, *The Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* 265, 269 (Peter Laslett ed., Cambridge Univ. Press student ed. 1988) (1689) (The “State all Men are naturally in . . . is . . . a *State of perfect Freedom* . . . [and a] *State also of Equality*, wherein all the Power and Jurisdiction is reciprocal, no one having more than another.”).

⁸ JOHN-JACQUES ROUSSEAU, *Discourse on the Origin of Inequality*, in *BASIC POLITICAL WRITINGS OF JEAN-JACQUES ROUSSEAU* 25, 60 (Donald A. Cress ed. & trans., Hackett Publishing Co. 1987) (1754) (“The first person who, having enclosed a plot of land, took it into his head to say *this is mine* and found people simple enough to believe him, was the true founder of civil society. What crimes, wars, murders, what miseries and horrors would the human race have been spared, had someone pulled up the stakes or filled in the ditch and cried out to his fellow men: ‘Do not listen to this impostor. You are lost if you forget that the fruits of the earth belong to all and the earth to no one!’”).

⁹ JOHN-JACQUES ROUSSEAU, *On the Social Contract*, in *BASIC POLITICAL WRITINGS OF JEAN-JACQUES ROUSSEAU*, *supra* note 8, at 141, 148.

¹⁰ *Id.* at 141.

¹¹ IMMANUEL KANT, *On the Common Saying: ‘This May Be True in Theory, but It Does Not Apply in Practice,’* in *KANT’S POLITICAL WRITINGS* 61, 73 (Hans Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press 2d, enlarged ed. 1991) (1793).

¹² IMMANUEL KANT, *Idea for a Universal History with a Cosmopolitan Purpose*, in *KANT’S POLITICAL WRITINGS*, *supra* note 11, at 41, 45–46.

development of all.”¹³ This is another way of stating that the principle of equal freedom is the measure of progress.

I do not wish to belabor the point about the historical origins of our ideas of progress. The thought is just that there is a deep standard from which we judge which rights and liberties, and thus which laws and policies, are in fact progressive. Those political acts that, in a given moment, expand some group’s ability to enjoy equal freedom are progressive. It has historically been argued that “social rights,” such as the right to a state-guaranteed pension, publicly financed health care, or public education are progressive because they give the most disadvantaged members equal, or at least less unequal, economic opportunities.¹⁴ But that is a contextual judgment about the nature and origins of certain disadvantages, the effects of social policies, and the costs of such policies. We know that in some situations, extension of social rights can also sometimes be a way of *limiting* other liberties. For instance, Bismarck created a system of national social insurance, including the first state-guaranteed pensions and welfare schemes, in order to control and limit the use of civil and political liberties by rebellious working and middle classes.¹⁵

My point here is not to settle any specific claim about whether social rights are desirable, but simply to reinforce my original point about what counts as progressive, and why it is important to be clear about the standard. The standard is whether particular measures advance the cause of equal freedom. In different circumstances the same measures—be they social rights, affirmative action, or whatever—can have different effects. What we first want to know is the standpoint from which a self-proclaimed progressive might evaluate these effects. I have suggested that there is a long-standing tradition of thinking about progress, which arose early in modern political thought, and which is familiar to us in some of the earliest statements of American political theory. It is this tradition that gave birth to the idea that progress is the expansion of equal freedom. By no measure do I think that I have fully defended this principle. I have only briefly sketched its origins in social contract theory and its passage through key figures of political philosophy as a way of describing what is hopefully a familiar train of thought to the reader. And indeed, recent discussions of progressive politics have turned to an assertion of something like this general principle.¹⁶ It seems to me, any self-proclaimed progressive is committed to the idea that progress is the expansion of equal freedom.

¹³ KARL MARX & FREDERICK ENGELS, *Manifesto of the Communist Party*, in THE MARX-ENGELS READER 473, 491 (Robert C. Tucker ed., W.W. Norton & Company 2d ed. 1978) (1848).

¹⁴ T.H. MARSHALL, *Citizenship and Social Class*, in CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS 1, 54–74 (1950).

¹⁵ DAVID BLACKBOURN & GEOFF ELEY, THE PECULIARITIES OF GERMAN HISTORY: BOURGEOIS SOCIETY AND POLITICS IN NINETEENTH-CENTURY GERMANY 148–49 (1984).

¹⁶ See, e.g., Aziz Rana, *Democrats Must Learn Language of Freedom*, CNN OPINION (Nov. 10, 2010, 9:11 AM), <http://www.cnn.com/2010/OPINION/11/10/rana.freedom>

B. *Progressive and Constitutionalist Views of Law and History*

I have begun with this discussion of progress because it helps us understand why there might be a contradiction, or at least tension, between progressivism and constitutionalism. When we understand progress in terms of the above principle, we tend to view law and history in a particular way. Progressives will tend to view history as the movement from unequal and oppressive to more free and equal social orders. One does not have to believe in a linear direction of history to adopt this general perspective. All it means is that we do not accord any immediate respect to existing social orders, to the continuity of their laws and institutions, and that we accept the possibility, and sometimes necessity, of a radical break with the past. The abolition of slavery, for instance, or the shift from violently suppressing to actively promoting the right of labor to organize,¹⁷ might be such dramatic changes. Sometimes, though not always, these dramatic progressive changes cannot be achieved by respecting the existing *constitutional* order—they require a transformation of the Constitution itself, and through mechanisms of legal change that a constitution does not itself prescribe.¹⁸ Moreover, a progressive will view the Constitution as just one amongst a number of possible sites of political struggle. That is to say, the progressive view of politics relativizes and instrumentalizes Constitutional politics. The Constitution is, or can be, one instrument in the overall project of progressive change, but there is no intrinsic or a priori respect for any given constitution as such. It is assessed from the standpoint of the substantive principle of equal freedom. Progressives are thus oriented towards the future, and aim at a political community of free and equal citizens that has yet to be fully realized.

Constitutionalism, on the other hand, tends to produce a different, even opposed view of law and history. Constitutionalism is associated with a backward-looking set of principles of practices. It produces a respect for the foundations of *existing* legal orders, and sees history through the lens of *past* acts of foundation that establish a valid source of legal authority and legitimate lawmaking. Indeed, while different philosophies of jurisprudence—say originalist versus living constitutionalist—might allow for different kinds of

.democrats/index.html; Corey Robin, *Reclaiming the Politics of Freedom*, NATION, Apr. 25, 2011, at 18, 20, 22.

¹⁷ On dramatic swings in labor law, see CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960*, at 60–95 (1985). See generally WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991) (detailing the progression of labor law in America).

¹⁸ These are, in a sense, the central themes of Ackerman's *We the People* volumes, although he takes the view that the circle can be squared by thinking of the People as a source of legally valid "higher lawmaking." 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 266 (1991). I will address this argument in the next section of this Article. See *infra* Part II.B.

change to the existing legal order, they all believe that legal change ought to be policed by the parameters of the *current* Constitution, whose authority is ultimately grounded in a *past* act of foundation. The ensuing view of politics is decidedly more gradualist and conservative than the progressive one. Constitutionalism tends to be associated with a set of institutions—such as, but not exclusively, judicial review—whereby the higher legal order is protected from the vagaries of ordinary political pressures. While on the progressive view the Constitution is one potential instrument for—but also a potential obstacle to—political change, on the constitutionalist view, the Constitution is essential not instrumental. It regulates ordinary politics in accordance not with substantive political principles—like the principle of progress—but with the formal principles of constitutional law, whatever the norms embedded in that constitution.

So there seems to me to be a real tension between a future-oriented politics of progress, which looks towards the realization of a future-free community of equals, and a backward-looking politics oriented towards the preservation of and respect for higher legal principles and institutional order. Of course, this tension requires a very broad and abstract characterization of constitutionalism, not to mention progressivism. There are, for instance, familiar distinctions between, say, legal versus political constitutionalism, in which a fair amount of what I say about the backward-looking and conservative character of constitutionalism does not apply.¹⁹ And indeed, as I will discuss in the next section, the attempt to manage the tension between progressivism and constitutionalism is precisely what has underwritten so much of the progressive constitutionalist writing. However, before we can appreciate what is going on with the more nuanced accounts of constitutionalism, we need to have a sense of the very tension between political principle and jurisprudential theory that various thinkers are trying to manage. For that reason, it is not just valid but necessary to begin with the stark and sweeping characterization of progress and constitutionalism. Only from that standpoint can we fully perceive the tension between a forward-looking progressive politics driven by a substantive political principle that gives no special regard to legal continuity or present social arrangements, and a backward-looking constitutionalist politics driven by respect for and continuity with established legal norms.

Progressive constitutionalists have been aware of this tension and have developed various strategies for managing it. Primarily, the strategy has been to develop a theory of constitutionalism that takes the Constitution out of the hands of judges and other legal experts, and puts it in the hands of the People and their representatives. Making the constitution more *popular* is supposed to make constitutionalism more *progressive*. In the next section I suggest that this is a necessary but insufficient move for progressive constitutionalism. It is

¹⁹For a defense of political against legal constitutionalism, see generally RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* (2007).

problematic for two reasons. First, it implies that a full theoretical resolution of the tension between progressivism and constitutionalism can be achieved. Second, by blurring the lines between popular and progressive constitutionalism, it ultimately gives priority to the formal principles of constitutionalism over the substantive principle of progress. Popular movements are essential to progressive politics, but popular movements of a particular kind. We need, in other words, a more refined understanding of what popular movements are progressive beyond simply the invocation of the People. Such a theory takes us beyond the idea that the People are the ultimate source of constitutional authority to a theory of the kinds of progressive majorities that can exercise their political agency to overcome entrenched obstacles to equal freedom.

III. THE LIMITS OF POPULAR CONSTITUTIONALISM

My aim in this section is to explain why popular constitutionalism is not straightforwardly progressive. Here I use the term popular constitutionalism to mean any theory of constitutionalism that argues that the constitution should be in the hands of the People and their elected representatives, rather than judges and legal experts. This definition slightly differs from the narrower idea that popular constitutionalism is the practice whereby the authority to interpret and enforce the Constitution lies with extra-legal or extraordinary bodies of the People,²⁰ like constitutional assemblies and other “out-of-doors” actions.²¹ On the latter view, the People stand against judges but *also* elected representatives, and all other constituted powers. We might say that the key distinction on the latter view is between constituent and constituted power.²² The People are the constituent power, the sole source of valid, higher constitutional law. Judges, legislators, bureaucrats, and other formal officials exercise only the powers assigned to them that are “constituted” by the Constitution. While I use a slightly different meaning, I do not do so in order to contest the more familiar usage. Rather, I do so to highlight a shared, democratic strategy amongst a number of progressive constitutionalists. Consider first, for instance, Robin West’s “legislative constitutionalists” approach to making the Constitution fit progressive aims.

²⁰ For this view of popular constitutionalism, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 7–8 (2004).

²¹ See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 319–28 (1998).

²² The distinction between constituent and constituted power originates with *What Is the Third Estate?*, Sieyès’s famous essay written at the dawn of the French Revolution. See EMMANUEL JOSEPH SIEYÈS, *What Is the Third Estate?*, in *POLITICAL WRITINGS* 93, 93–162 (Michael Sonenscher ed., Hackett Publishing Co. 2003) (1789).

A. Legislative Constitutionalism and the Limits of Popular Politics

Robin West has suggested that we mistakenly view judges as the sole interpreters of the Constitution's principles when in fact legislators are also authorized, and even commanded, by the Constitution to enact its principles in positive law. We have further failed to see that, for legislators, the logic of the Constitution is different. Judges are constrained by principles of "adjudicative rationality" and nondiscrimination,²³ in part because they conform to a concern with *stare decisis* and the rule of law.²⁴ This affects their interpretation of constitutional amendments, like the Equal Protection Clause of the Fourteenth Amendment. Courts have tended to interpret it to mean citizens are "entitled to equal protection *against* law," specifically against law that "irrationally discriminates on the basis of a short list of specified characteristics, such as race, ethnicity, sex, or religious affiliation."²⁵ On West's account, because we have given priority to the judicial view of the Constitution, we have "perversely limited the substantive scope of the mandate" of the Equal Protection Clause.²⁶ In particular, we have failed to think through what the implications of the guarantee of the equal protection *of* the laws, not *against* the laws, means, especially for the extension of social rights to the poor.²⁷ The deep-seated reason for this error, for West, is that the Court's way of thinking has colonized our way of thinking about the Constitution, obscuring the way it addresses legislators, and the way legislators are just as much a part of interpreting and applying constitutional law.

For West, the minute we switch to the legislative perspective, we not only see how it activates the collective power of the political community to engage in positive acts of legal change, but we see how this legislative constitutionalism can be "fruitfully aligned with progressive activism against poverty."²⁸ The connection between a more popular constitutionalism and progressive aims has to do with a different vision of law. From the legislative constitutionalist standpoint, "[l]aw is the means by which the constitutional entitlement is secured, rather than the evil against which the constitutional entitlement guards us. The lawmaker is the agent of the constitutional protection. . . ."²⁹

Positive law can be used to correct for the forms of private domination and social inequality that spring up in civil society. Welfare rights, health and safety regulations, protective legislation, are all—or can be—instruments for securing the "equal protection of the laws" against unequal social power. As West notes, this way of thinking about the Constitution draws on a decidedly different view

²³ Robin West, *The Missing Jurisprudence of the Legislated Constitution*, in *THE CONSTITUTION IN 2020*, at 79, 83 (Jack M. Balkin & Reva B. Siegal eds., 2009).

²⁴ *Id.* at 82.

²⁵ *Id.* at 81.

²⁶ *Id.* at 83.

²⁷ *Id.* at 81–82.

²⁸ *Id.* at 86.

²⁹ West, *supra* note 23, at 88.

of the relationship between popular power and the Constitution. It draws on the view that "conscientious legislators, going back to the time of the ancient Greeks, . . . act in such a way as to equally protect the well-being of all . . . in part, through the recognition of positive rights."³⁰ Law is used to "effect a change in social reality,"³¹ an instrument through which citizens use their collective power to constitute relations of freedom and equality against the natural inequalities that spring up in society.

West is undoubtedly correct to draw a connection between a particular view of law and progressive aims. In *On the Social Contract*, Rousseau makes a similar argument for the ability of the law to correct social inequalities, and thus guarantee the equal freedom of citizens: "It is precisely because the force of things tends always to destroy equality that the force of legislation should always tend to maintain it."³²

The virtue of this view of constitutional law is that it is both forward looking, and understands the law as an instrument for the transformation of social reality. The difficulty, however, is that the argument remains an argument at the level of jurisprudence rather than political theory. The hope is that, if one gets the jurisprudence right, progressive outcomes will follow. As West says,

[P]rogressive lawyers should take this opportunity of their respite from judicial power and attend to the development of that Constitution, so that we might at some point in the future urge fidelity to it on the part of our representatives, rather than continue to attend, with the same intense devotion that still characterizes our current legal zeitgeist, to the adjudicated Constitution.³³

There is a dual problem here. First, though West undoubtedly knows that the reasons for the "respite" of progressive influence over courts are political and involuntary, it is nonetheless presented as if it were somehow voluntary or accidental. There is no examination of the connection between the advocates of certain jurisprudential doctrines and the wider political conditions under which they have influence.

Secondly, to the degree there is a model of politics, it is not all that popular. The main role of the average citizen appears to be to elect the right representative, where the right representative appears to be the one who will then listen to progressive lawyers. The main political task appears to be to develop the right jurisprudence and then "urge fidelity to it on the part of our representatives," *regardless* of the degree to which the People at large accept, understand or are activated by any of these principles.³⁴ Indeed, it would appear that representatives *must* be somewhat insulated from wider political pressures if they are to attend primarily to the urgings of progressive lawyers. Thus,

³⁰ *Id.* at 86.

³¹ *Id.*

³² ROUSSEAU, *supra* note 9, at 171.

³³ West, *supra* note 23, at 79.

³⁴ *Id.*

despite West's appeal to the connection between a politically active political community and progressive ends, the underlying political theory still appears to be a variant of the "leave it to the legal experts." What has changed is that the legal experts exercise their power and influence through a different, implicitly politically insulated, segment of the state representatives—not judges.

To be clear, I am not arguing for a wholesale rejection of legislative constitutionalist principles. The underlying idea, which West eloquently defends, that law should be seen as an instrument for realizing progressive ends over and against a social reality that frequently violates them is an important and necessary thought. My argument is rather that the argument suffers from what I think is a characteristic flaw in the general efforts by progressive constitutionalists to make the Constitution more popular. The approach to making the Constitution more popular is done from the standpoint of getting the *jurisprudence* right, not from the standpoint of progressive *political* theory. In West's particular case, this ends up not just emphasizing jurisprudence at the expense of political theory, but also reasserting the primacy of legal expertise. The political stakes are potentially significant. It is not inconceivable that the "correct" jurisprudence, in the absence of actual progressive politics, could produce anti-progressive results.³⁵ A second example will show that, even when an ostensibly more popular approach is taken to constitutionalism, the absence of progressive political theory is still the core problem.

B. Ackerman's People: The Distinction Between Populist and Progressive

Bruce Ackerman presents us with a more radical assertion of the role of the People in creating, interpreting and revising the Constitution.³⁶ While on West's view constitutional principles already exist, and it is up to legislators to interpret and apply them, on Ackerman's view, the People *create* the very Constitution that is then supposed to guide normal politics. Ackerman's theory is complex, but the basic elements of the two-track theory are simple enough. There are extraordinary moments of higher lawmaking, when the People exercise their collective will to create new legal norms that are supposed to regulate the

³⁵ There is no room to get into a full example, but it is conceivable that one could view the infamous *Kelo v. City of New London*, 545 U.S. 469 (2005), case in this way. When the Court decided to allow legislators to interpret what counts as "public use," even if that meant using the state's eminent domain power to forcibly buy private property and immediately sell it to private corporations, it effectively applied a kind of legislative constitutionalist idea not wholly different from West's. *Id.* at 483–84. The upshot was to say, if legislators wish to use the state's positive power to create certain economic conditions that it thinks advances basic constitutional principles then the particular economic conditions that count as public use will be up to legislators to decide. The problem here was not the jurisprudence but the conception of the kinds of economic conditions that are actually in the public interest. That depends on progressive politics—or its failure—not on the right or wrong jurisprudence.

³⁶ ACKERMAN, *supra* note 18.

ordinary, everyday practice of lower or regular lawmaking. Let us put to one side the question of how we know whether we are in an extraordinary or ordinary moment.³⁷ The basic thought is that *internal* to the constitutional principles of the American republic is a theory of how the Constitution can be revised, and even more important, how this revision is consistent with democracy.³⁸ That is to say, these exceptional moments of higher lawmaking do not signal an overall break in legal continuity but rather the activation of a higher legal norm regarding who is authorized to change the Constitution. On the two-track system, only the People are allowed to change the Constitution, and whenever they make a change, this change is legally valid. And since it is the People that are acting, there is no conflict between judicial review and democracy. All that judges do is apply the higher, collective will of the People over and against the lesser will of everyday majorities.³⁹

Ackerman is not first and foremost concerned with *progressive* politics. But he is concerned to show why this constitutional theory makes progressive change possible. It is, on his account, what made possible certain key constitutional moments:

Thus, the original Constitution codified the Revolutionary generation's defeat of monarchy on behalf of republican self-government; the Civil War amendments codified the struggle of an entire generation to repudiate slavery on behalf of a new constitutional ideal of equality; and so forth. . . .

. . . American history has been punctuated by successful exercise in *revolutionary reform*⁴⁰

And these moments, on his reading, were deeply progressive because of the way in which they served to use the state to correct inequalities and create new rights for disadvantaged citizens.⁴¹ As Ackerman puts it, "Americans have not been 'born equal' through some miraculous act of immaculate conception

³⁷ Ackerman spends a good deal of time in the first volume of *We The People* trying to provide criteria for when we can say that the People have truly appeared, articulating a collective will, as opposed to just some interest group *claiming* to speak for the People. See ACKERMAN, *supra* note 18, at 266–94. For a theoretical critique of Ackerman's model as being underspecified, see Don Herzog, *Democratic Credentials*, 104 ETHICS 467, 468–72 (1994). For a historical critique, arguing that Ackerman's criteria fail to pick out all the crucial constitutional shifts, especially ones that signal a *backward* movement in the extension of rights and liberties, see Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 2003, 2003, 2009 (1999); William E. Forbath, *Constitutional Change and the Politics of History*, 108 YALE L.J. 1917, 1922–23 (1999).

³⁸ Ackerman is especially eager to use this two-track theory to defend the practice of judicial review from the antimajoritarian or democratic critique. See ACKERMAN, *supra* note 18, at 12–16.

³⁹ *Id.* at 20.

⁴⁰ *Id.* at 19.

⁴¹ This is the overall argument of the second volume. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 207–53, 279–311 (1998).

[W]e have won it through energetic debate, popular decision, and constitutional creativity.”⁴² We might worry that Ackerman’s actual reading of history is a bit Whiggish,⁴³ but that is not the most serious concern from the standpoint of progressive constitutionalism. In fact, there are aspects of this theory that do seem to line up generally with a progressive outlook. The thought that the People are capable of interpreting, acting on and transforming the Constitution is certainly consistent with egalitarian and democratic aspects of progressive political theory. Moreover, this way of making the People not just the authors but the revisers of the Constitution opens up the possibility for radical change. It gives popular constitutionalism a dramatically forward-looking character that, as I argued in the first section, is often missing from constitutionalism generally and thus puts it at odds with progressive ideas and aspirations.

Nevertheless, however *popular* this constitutional theory is, it is not straightforwardly *progressive*. The reason is that the People are a purely formal principle in Ackerman’s theory. They are a kind of content-free grundnorm, or source of higher legal validity. *Whatever* the People say, so long as they speak as the People, is valid constitutional law. As Ackerman himself notes, if the People pass a Constitutional amendment proclaiming that “Christianity is established as the state religion of the American people, and the public worship of other gods is hereby forbidden,” it would have to be considered “a fundamental part of the American Constitution.”⁴⁴ Or, taking a (mildly) more plausible example, if the People made a constitutional amendment stating that persons born on American soil to parents without legal documentation should be denied citizenship, then that would be a valid act of higher law. On Ackerman’s dualist view these are consistent with the popular character of his constitutionalism. However, these amendments are clearly not *progressive*. For instance, the anti-immigrant amendment would evidently be regressive, introducing a new structure of oppression where one did not exist—a subtraction of the equal freedom of persons.

The problem I am trying to get at is that, in the popular constitutionalist theory, the connection between popular agency and progress is entirely contingent. There is no inner account of the connection between the People and progress. Of course, as mentioned, Ackerman wants to argue that *in practice* this popular constitutionalist practice *has* served progressive ends, at least on the whole. This appeal to actual history, however, has two problems. First, it raises the aforementioned Whiggish reading of history. Second, and more importantly, it shows how the constitutionalist side of the theory has gotten the upper hand on the progressive side. At the theoretical level, the popular constitutionalist appears only obligated to provide a constitutional theory—not a theory of why popular agency is connected to politics. Indeed, even if history

⁴² ACKERMAN, *supra* note 18, at 27.

⁴³ See sources cited *supra* note 36; see also Symposium, *Moments of Change: Transformation in American Constitutionalism*, 108 YALE L.J. 1917 (1999).

⁴⁴ ACKERMAN, *supra* note 18, at 14.

had on the whole turned out to be more progressive than not, that mere fact would not give us an account of why or under what conditions popular agency is indeed progressive. There are no theoretical criteria provided for thinking about which popular agents advance—and which subtract from—the expansion of equal freedom. It seems to me that a progressive would have to be unhappy with this result, especially someone concerned with the tension between constitutionalism and progressivism. By trading in history for theoretical argument, the popular constitutionalist makes a real theoretical tension appear like a mere empirical problem—an argument over the facts.

The basic point I hope to get out of this section is that the mere move of trying to make the Constitution more popular is not going to resolve the tension between progressivism and constitutionalism. We might of course worry that Ackerman ends up taking away with one hand what he gives with the other. Although the People get to act in extraordinary moments, it is judges who still engage in all the real action of interpreting and applying the Constitution.⁴⁵ So an ostensibly popular constitutionalism is in fact a backhanded reassertion of the authority of legal experts, not a real invocation of popular agency. Indeed, Ackerman sees this theory as a way of saving judicial review itself. However, I want to emphasize the wider point about progress and popular agency, which I think afflicts not just Ackerman's version of popular constitutionalism, but just about all popular constitutionalisms that generally invoke the People as final arbiters. That is to say, I am using Ackerman (alongside West) as a kind of representative of a general tendency amongst progressive constitutional theorists to think that a generally democratic or populist theory of constitutional jurisprudence is adequate to manage the tension between progressivism and constitutionalism. While I share the democratic sympathies of these popular constitutionalists, they have failed to provide an adequately refined theory of when popular agents are in fact progressive agents. That is to say, it might be correct that no progressive change happens, or at least lasts, without the backing of a democratic movement. But not just any popular political movement is therefore progressive.

IV. PROGRESS AND THE AGENCY OF THE UNFREE: THE EXAMPLE OF LABOR REPUBLICANISM

A different way of thinking about the connection between progressivism and popular agency is to ask first a political, rather than legal, question. The legal question, as we have seen, has to do with popular agency and legal authority. Who authoritatively makes and interprets constitutional law? The political question has to do with the connection between interests and ideals. What political agents have an interest in the advancement of progressive ideals,

⁴⁵ This is a problem noted even by sympathetic critics, like Frank Michelman, who accuses Ackerman of “[p]opular [a]uthoritarianism.” See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1515–24 (1988).

specifically the expansion of equal freedom? The answer to this question can help us identify which popular agents are progressive, and the implications for constitutionalism. The basic thought I would like to defend is that those groups that suffer from a particular unfreedom are the kinds of popular actors that can form the basis of popular progressive action. The reason is that they have an interest in overcoming their particular form of unfreedom. Their interest is therefore aligned with the general, progressive aims of expanding equal freedom. In other words, the popular agents, who are likely to be progressive, are those groups that suffer from particular kinds of unequal enjoyment of their rights and liberties. To make this claim concrete, I shall use the historical example of nineteenth century labor republicanism. This intellectual and political movement can serve as a model for understanding what kinds of popular agents are progressive, their ambivalent relationship to constitutionalism, and thus the inherent tensions in progressive constitutionalism itself.

A. Labor Republicanism and Liberty

The labor republicans were a group of nineteenth-century reformers,⁴⁶ mostly around the Knights of Labor,⁴⁷ who felt that modern, industrial society had failed to live up to America's founding republican principles. In the words of one labor republican, "our rulers, statesmen and orators have not attempted to engraft republican principles into our industrial system, and have forgotten or denied its underlying principles."⁴⁸ In particular, they felt that a society based on permanent wage labor violated the independence owed to all citizens. In the words of journalist George McNeil, "[t]here is an inevitable and irresistible conflict between the wage-system of labor and the republican system of government."⁴⁹ This argument drew on a long-standing interpretation of the meaning of republican liberty. Republican liberty meant independence, where independence meant control over one's labor activity, not just the right to earn whatever price one could receive in the labor market. This kind of independent, free labor was crucial to the enjoyment and practice of full citizenship.⁵⁰ Since the Constitution guaranteed a republican form of government, and this included

⁴⁶ On labor republicanism, see, for example, Forbath, *supra* note 5, at 800–17; Wilentz, *supra* note 5, at 14–16. See generally Montgomery, *supra* note 5; Pope, *supra* note 5.

⁴⁷ On the Knights of Labor and their connection to republicanism, see STEVE LEIKIN, *THE PRACTICAL UTOPIANS: AMERICAN WORKERS AND THE COOPERATIVE MOVEMENT IN THE GILDED AGE* 53–88 (2004). See generally LEON FINK, *WORKINGMEN'S DEMOCRACY: THE KNIGHTS OF LABOR AND AMERICAN POLITICS* (1983).

⁴⁸ George E. McNeil, *The Problem of To-day*, in *THE LABOR MOVEMENT: THE PROBLEM OF TO-DAY* 454, 456 (George E. McNeil ed., New York, The M.W. Hazen Co. 1892).

⁴⁹ *Id.* at 459.

⁵⁰ On free labor ideology, see DANIEL T. RODGERS, *THE WORK ETHIC IN INDUSTRIAL AMERICA 1850–1920*, at 1–29 (1979). See generally ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1971).

that each citizen enjoy republican liberty, they felt it necessary “to abolish as rapidly as possible, the wage system, substituting co-operation therefore.”⁵¹ Co-operation meant shared ownership of industries and stores, as well as the support of a background set of economic conditions, regulated by law, which made their flourishing possible, such as “a just and humane system of land ownership, [public] control of machinery, railroads, and telegraphs, as well as an equitable currency system.”⁵² The way to engraft republican principles onto the industrial system was to establish a cooperative commonwealth.⁵³

The first thing that is important to us about the labor republicans is that they were making an argument for progress. They felt that, in their times, only a few enjoyed the republican liberty that all ought to enjoy equally. They were interpreting the Constitution from the standpoint of equal freedom. That is to say, their concern was with how to universalize constitutional principles so that they applied to all equally. If independence, or republican liberty, was a constitutional value, their concern was with how it could be a value for all who lived by its law. First and foremost, the Constitution was a body of principles available to all actors, but which ought to be interpreted from a particular point of view.

B. Political Mobilization of the Unfree

Second, and even more important, the labor republicans were not content merely with calling for a cooperative commonwealth and hoping that those in power would listen and be converted to their cause. Labor republicans thought that existing institutions and actors stood in the way of the cooperative commonwealth, because these institutions reflected the power of the dominant interests in society. Their targets included not just employers and big business, but also judges and elected officials. They were highly suspicious of existing parties,⁵⁴ and felt judges had been corrupted by the influence of wealth.⁵⁵ More profoundly, labor republicans were activated by a particular kind of political sociology of power. The basic thought was that those who have an interest in maintaining conditions of inequality and unfreedom are unlikely to act so as to change it. In the pithy words of one early labor republican, “history does not furnish an instance wherein the depository of power voluntarily abrogated its

⁵¹ S.M. JELLEY, *THE VOICE OF LABOR* 203 (Chicago, A.B. Gehman & Co. 1887).

⁵² T.V. POWDERLY, *THIRTY YEARS OF LABOR* 515 (Columbus, Excelsior Publishing House 1889).

⁵³ See sources cited *supra* note 46; see also Alex Gourevitch, *Labor and Republican Liberty*, 18 *CONSTELLATIONS* 431, 437–44 (2011); Alex Gourevitch, *Servitude and Independence: Rethinking Liberty, Virtue and the Republican Tradition* (Oct. 20, 2010) (unpublished Ph.D. dissertation, Columbia University) (on file with author).

⁵⁴ See FINK, *supra* note 46, at 18–35.

⁵⁵ McNeil, *supra* note 47, at 456 (“[C]ourts are administrators of estates, and not of justice . . .”).

prerogative, or the oppressor relinquished his advantages in favour of the oppressed.”⁵⁶

The only way to overcome this resistance to progressive change, and to achieve lasting social and economic transformation, was through the joint political efforts of those who had an interest in change. In an address to a convention of iron molders considering the formation of a national union, William H. Sylvis, one of the founders of the short-lived National Labor Union, made clear why the task lay with laborers:

Is there any reason why we should not occupy a social position equal to other men? Labor is the foundation of the entire political, social, and commercial structure. Labor is the author of all wealth; it is labor that breathes into the nostrils of inert matter its commercial existence. And yet we are told by the aristocracy—by these sticklers for the divine right to rule the world—that we are only fitted to be the “hewers of wood and drawers of water;” and, therefore, should be kept in constant subjection.⁵⁷

As a foundation that was nonetheless exploited, it was only laborers who had an interest in overcoming the inequality of its situation. Moreover, it could only do so through the self-organization of laborers as a whole. Terence Powderly, leader of the Knights of Labor during its heyday, made this point by arguing against the separation of laborers into different trade unions: “When I joined the Knights of Labor I left the trades union. . . . I believe in combining all the scattered battalions of labor’s mighty host”⁵⁸ The point was not just that laborers ought to be the agents of change, but that they could only be such agents if they acted as one, rather than in competition with each other. To solidify that collective agency, they had to look past short-term self-interest and seize on a shared commitment to and interest in a long-term project of social transformation: “The condition of one part of our class cannot be improved *permanently* unless all are improved together.”⁵⁹ A cooperative commonwealth could only be achieved through the political agency of those who suffered from the unequal distribution of economic liberty.

Importantly, labor republicans did not believe that this change would happen spontaneously. They had a rather elaborate theory of the reasons why many members of the laboring classes tended to act against their own interests, politically and even in their general cultural consciousness. Many laborers were overworked, and thus lacked the time to inform themselves about politics, let

⁵⁶ L. BYLLESBY, *OBSERVATIONS ON THE SOURCES AND EFFECTS OF UNEQUAL WEALTH* 5 (New York, Lewis J. Nichols 1826).

⁵⁷ James C. Sylvis, *Address Delivered at Buffalo, N.Y., January, 1864*, in *THE LIFE: SPEECHES, LABORS AND ESSAYS OF WILLIAM H. SYLVIS* 96, 111–12 (Augustus M. Kelley Publishers 1968) (1872).

⁵⁸ Letter from T.V. Powderly to the Noble Order of the Knights of Labor of America, (May 3, 1886), in *LABOR: ITS RIGHTS AND WRONGS* 66, 73 (Washington, D.C., The Labor Publishing Co. 1886).

⁵⁹ POWDERLY, *supra* note 51, at 121 (emphasis added).

alone participate in collective action. In this vein, William Sylvis, an active campaigner for eight-hours legislation,⁶⁰ argued: "Our labor occupies too large a portion of our time to enable us to read, study, and reflect. A high degree of intelligence is necessary to enable us to discharge all the duties of citizens."⁶¹ Their desires, moreover, reflected the desire to escape fatiguing daily life. Moreover, even if they did have energy for politics, the press either failed to report crucial facts, or did so in a distorted way—in no small part because of the control of the wealthy over presses and educational opportunities. Ira Steward, an equally ardent eight-hours campaigner and labor reformer, regularly declaimed the way "[c]apital, with swift enterprise, can pay for heralding to the ears of ignorance favorite catch-words, while its control of the daily press and party machinery leaves the intelligent workingman, of slender means, in a mortifying minority."⁶²

And laborers tended, because of labor market conditions, to see each other as competitors rather than cooperators, thus impeding the possibility of collective action. As one labor republican put it, the laborer had to learn a whole new theory of power, in particular, to embrace the thought that the individual became stronger through association and cooperation rather than weaker. William Sylvis stated the tension neatly: "I am fully imbued with that great American idea of individual independence, and much as I admire it as a characteristic of our race, yet I cannot fail to see that, if adhered to in our dealings with capitalists, it must sooner or later bring us to one common ruin."⁶³

What had to change was the thought that the individual could advance purely through individual efforts, rather than through solidarity and cooperation with similarly situated fellow laborers.

The upshot of this social analysis is that the spontaneous tendency of an unequal society is not towards greater equality but rather towards the status quo. If it produces a group of people who have an interest in change, it also—in no small part due to the efforts of the powerful—tends to produce an array of obstacles to that group exercising its political agency. For this reason, labor republicans created political organizations like the Knights of Labor, labor presses, and educational activities. Labor leaders like Sylvis argued: "We must erect our own halls wherein we can establish our own libraries, reading- and lecture-rooms, under the control and management of our own men; and we must have time to use them."⁶⁴ Likewise, Powderly called for "the establishment of

⁶⁰ On Sylvis, see David Montgomery, *William H. Sylvis and the Search for Working-Class Citizenship*, in *LABOR LEADERS IN AMERICA* 3, 3–29 (Melvyn Dubofsky & Warren Van Tine eds., 1987).

⁶¹ Sylvis, *supra* note 56, at 113.

⁶² Ira Steward, *A Reduction of Hours an Increase of Wages*, in 9 *A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY* 284, 292 (John R. Commons et al. eds., The Arthur T. Clark Co. 1910) (1865).

⁶³ Sylvis, *supra* note 56, at 107.

⁶⁴ *Id.* at 114.

workingmen's lyceums and reading-rooms."⁶⁵ These forms of self-organization and self-education were aimed at creating the shared identity and political capacity of the laboring classes. They had the end of showing laborers that they "had the same right to study social, economic, and political questions that their employers had,"⁶⁶ and gave the otherwise poorly educated worker the opportunity to acquire a "true sense of his surroundings."⁶⁷ What these developments show is that the Knights of Labor—at its best—was aimed at a wide array of popular actors, but it was not grounded in an empty, free-floating invocation of the People. It was not addressed to, nor even always open to, all citizens uniformly.⁶⁸ It had a definite sense of what *kind* of popular actor, not just as a matter of socioeconomically determined interests but as a politically organized and active entity, would advance the cause of progress. What distinguished it from mere populism was the thought that only specific forms of popular agency would lead in a progressive direction—the agency of the unfree, in this case laboring, classes.

So the significant, second lesson one can draw from the labor republican example is not so much about their specific tactics, which would require a separate article to debate. Rather, one can acquire a more general picture of what it means to distinguish progressive from nonprogressive popular actors. The core thought that progressive change only arises in a sustained way from the political agency of the oppressed, or the dependent, or however exactly we wish to characterize them. This is because other groups will tend to resist social transformation, and because only the unfree have an interest in the kinds of changes that will expand equal freedom. It is this basic idea that allows the progressive view of politics to distinguish itself from populism. And we can see it at work in a real historical example. One further upshot, which I shall discuss a bit further in the conclusion, is that the creation of progressive majorities is not a matter of a few good court rulings or a "switch in time" or anything so sudden, but the product of sustained and difficult political work.

C. *The Limits of Progressive Constitutionalism*

The peak years of the Knights of Labor were from 1869 to 1896. This was a time of extraordinary repression, often quite violent.⁶⁹ This violence was often legally sanctioned, and the sanctions were grounded in a variety of court

⁶⁵ POWDERLY, *supra* note 51, at 68. On the importance of educational centers, reading rooms, and labor presses for democratizing intelligence, see FINK, *supra* note 47, at 10–11.

⁶⁶ POWDERLY, *supra* note 51, at 56.

⁶⁷ *Id.* at 62.

⁶⁸ On membership see FINK, *supra* note 46, at 13–15.

⁶⁹ On violence during this period, see LOUIS ADAMIC, *DYNAMITE: THE STORY OF CLASS VIOLENCE IN AMERICA* 22–127 (Chelsea House Publishers rev. 2d ed. 1958) (1934); TOMLINS, *supra* note 17, at 11–59; William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1185–95 (1989).

precedents.⁷⁰ Labor republicans were thus caught between actual court rulings, and their commitment to expanding equal freedom. Their attempts to get their interpretation of the Constitution, especially regarding the kind of republican liberty owed to all citizens, were ultimately defeated.⁷¹ Courts were under the influence of a different reading of the Constitution, promoted by other groups in society, including newly emerging professional lawyers and business interests.⁷² Labor republicans were thus caught between constitutionalism and progressive politics.⁷³ On the other hand, winning the constitutional battle was only one amongst a variety of political strategies they employed. Aside from their organizational and educational efforts, they used strikes and collective negotiations to struggle with employers for shorter hours and higher wages, they lobbied congressmen for various changes to monetary policy, maximum hours laws, and protective legislation, and they created their own cooperative businesses and stores.⁷⁴ In other words, the Constitution was only one of a number of sites of progressive struggle. Moreover, the turn to these other strategies had to do with the fact, in part, that to realize progressive ideals, they had to transform the Constitution from an authoritative legal document into a set of ideals to be realized in social and political life. In other words, they had to abandon any hope of winning the battle for progressive ideals through constitutionalism, and instead win it through other political means.

A reason for emphasizing the labor republican *failure* at the constitutional or judicial level is that it returns us to the tension between constitutionalism and progressivism. At the time of the labor republicans, a respect for constitutional practice meant going against one of the most progressive currents in American politics. Indeed labor republicans themselves were forced by precedent and existing law into a painful political problem of either rejecting existing authorities outright, even engaging in extra-legal action,⁷⁵ or accepting the legitimacy of constitutional rulings despite their implications for the ability to overcome a major barrier to the enjoyment of equal freedom. It is not immediately evident which is or was the most appropriate course. But the

⁷⁰ See sources cited *supra* note 68.

⁷¹ See Pope, *supra* note 5, at 1020–25.

⁷² On professional lawyering and the development of legal doctrine at the time, see Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 327–31 (1985).

⁷³ Again, I want to be clear that I am not calling labor republicans “Progressives” in the way that the term is used in nineteenth-century historiography. I am calling them progressives in the sense that they were committed to the substantive principle of progress I discussed earlier.

⁷⁴ On the political activities of the Knights of Labor, see FINK, *supra* note 46, at 18–37. For a discussion of the creation of cooperative stores and industries, see LEIKIN, *supra* note 46, at 25–88.

⁷⁵ This was, for instance, sometimes the case regarding whether to strike for certain economic or political ends. See James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 105–11 (2002).

underlying point is that the structure of constitutional practice, even on its most popular constitutionalist interpretation, heavily constrained the ability of progressive agents to transform society.

Moreover, given the pervasive influence of other, dominant interests on court rulings of the time, it is evident from the labor republican example that progressive constitutionalism is not always possible. The implication, at least, is that only when progressive agents are able to articulate a vision, and have that vision won at multiple levels of society, is something like a progressive politics of the Constitution likely to happen. To be clear, this is not just an empirical prediction about when judicial review—or some other form of constitutionalist practice—will favor progressive ends. It is also a theoretical point about what it takes to transform social reality in a progressive direction. It takes more than a change of law at the highest level. A core thought of labor republicans was that, without widespread desire for and acceptance of new liberties and expanded opportunities, changes in the law would not dramatically affect social practices. If, for instance, they could not organize and persuade workers to engage in cooperative enterprises, as opposed to wage labor, the law could never successfully coerce them into such enterprises, and even if it did, this new economic order would no longer be an expression of equal freedom. Without the wider social support for judicial and legislative reform, promising new laws, policies, and institutions would be subverted by existing inequalities of power. So the final, third general insight here is that progressive constitutionalism has to refer to more than just legal, but also social change. And moreover, a constitutional politics might only be possible under certain conditions—e.g., conditions in which there is broad-based, active support from those classes seeking inclusion in an order of equal freedom.

D. Restating the Limits and Insights of the Labor Republican Model

I have suggested we view the labor republicans as a model of both what progressive constitutionalism might look like, and of what the tensions are between progressivism and constitutionalism. First, we saw that labor republicans seized on certain founding principles, like republican liberty, and sought to universalize them. That is to say, they interpreted constitutional principle from the standpoint of a substantive progressive principle: the expansion of equal freedom. If republican liberty was a value, it was a value only insofar as all could enjoy it equally. This is a progressive way of seizing upon constitutional principles. Second, labor republicans showed us how we can move beyond the tendency simply to invoke the People, or, put another way, how we can identify the distinguishing feature between popular and progressive constitutionalism. The former makes the People into a founding legal authority. The latter tightens the connection between popular agency and progressive change. We found in the labor republicans a generalizable theory: those groups who have an interest in overcoming barriers to equal freedom are the kinds of popular agents who can form the basis of a progressive politics. But

they will only be part of a progressive coalition if they are organized on the basis of their shared interests in equal freedom, not simply as isolated citizens or members of the People. Indeed, we might even say that the labor republican example warns us that populist appeals to the People can paper over the inherently conflictual nature of progressive politics, since progressive groups will tend to be in conflict with those who wish to defend the current order. The partisan character of progressive argument and struggle does not violate the commitment to general principles, like equal freedom, but it suggests a different connection between partial and common interests.

Third, we find in the labor republicans the important thought that progressive constitutionalism is possible only under certain conditions. This is because legal change, alone, can only effect limited social change. Progressive politics happens at multiple levels, and without transformations at the legislative, social and cultural level, legal changes can be subverted, or will be hard to sustain over the long run. Moreover, there are only certain conditions under which a court will rule in a progressive direction anyhow. From the labor republicans, we learn that these conditions appear to be situations in which progressive coalitions are able to exercise sustained political influence—and even then, there is no guarantee. Moreover, there are situations where the conflict between progressivism and constitutionalism is unavoidable; indeed, this is likely to be the normal relationship between progressivism and constitutionalism. No constitutional theory can fully overcome this tension, and it is notable that labor republicans never offer a full theory of jurisprudence so much as their interpretation of certain constitutional principles. The ambivalence, then, of the labor republican example is a part of the overall lesson. We can draw some insights for when constitutional politics, or what kinds of appeal to constitutional principles, might be progressive, but without losing sight of the overall, background contradiction that structures the relationship between forward-looking efforts at expanding equal freedom and backward-looking respect for precedent and legal continuity.

V. CONCLUSION

This Article has had one theoretical and one political objective. The theoretical objective is to clarify why there is a sometimes manageable but ultimately irresolvable tension between progressive politics and constitutionalism. The political objective is to take from this theoretical problem, as well as from the historical example of labor republicanism, a kind of lesson for progressive lawyering. The weight of discussions about progressive constitutionalism have tended to suggest that the key role for progressive lawyers and other legal experts is to cultivate certain legal doctrines, and to seek to convince judges and perhaps legislators of the validity of these doctrines. However, if we accept the limits of constitutionalism, and the argument that certain kinds of popular agents are the basis for any sustained progressive politics it seems to me that political attention ought to be directed

elsewhere. Instead of continuously developing constitutional doctrines that appeal to the minds of certain experts, more attention ought to be directed to the law and politics of creating and sustaining progressive majorities.⁷⁶ At the end of the day, even if a given progressive constitutionalist is committed to constitutionalism first and progressivism second, this ought to be that person's objective because these majorities are necessary for progressive ideas to get a sustained hearing even at the judicial level. One suspects that, these days, the respite from progressive influence in the court has less to do with the development of proper doctrine and more to do with the decline of progressive politics over the past thirty years.

So the political objective of this Article has been to suggest that progressive lawyers and legal experts might widen the range of political activities they think are worthy of their time. This does not necessarily mean exchanging law and legal theory for the activist's hat. But it does mean that making the intellectual and legal case for, say, stronger rights to organize for labor, or more political and civil rights for undocumented immigrants, ought to be the focus of progressive lawyering. These kinds of rights make it easier for progressive groups—those who suffer from certain kinds of unfreedom and inequality—to exercise their own political agency. There is no substitute for the political agency of the progressive classes.

⁷⁶On the importance of progressive majorities, and the kinds of popular groups that would likely be part of such a coalition, see Gourevitch & Rana, *supra* note 4.